Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1997

LEO FRIES,

*Petitioner,*

*vs.*

RICHARD J. HELSPER, HELSPER & RASMUSSEN P.C., a South Dakota Corporation, PAUL DAVID, GEORGE RICHARDS, C. DUANE PATTERSON, PATTERSON RICHARDS HESSERT WENDORFF & ELLISON, a Wisconsin law firm, and O. DALE LARSON,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the complaint state a cause of action under 42 U.S.C. § 1983 for denial of Fries' due process rights, *under color of law*, against attorney defendants who gave Fries a "second opinion" on his royalty claim against "Larson Manufacturing Company" and who subsequently were allowed to appear, without a hearing on his motion to remove said counsel, in behalf of three separate corporations owned by defendant O. Dale Larson each using the name "Larson Manufacturing Company" to bar the Fries state action against them for his invention royalty?

2. Did Judge Crabb have jurisdiction in the case assigned to Judge Shabaz without any notice of, or order for, transfer to her when Judge Shabaz' order for hearing motions was of record?

2(a). Was it frivolous for Fries to challenge such jurisdiction?

3. Was the Fries July 7, 1997 motion for recusal of Judge Crabb for bias against Fries under 28 U.S.C. § 455 proper under the circumstances?

4. Were Rule 11 sanctions improper in light of the allegations in the § 1983 complaint and the case circumstances?

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, by virtue of the imposition of sanctions, the counsel of record for Leo Fries in the lower court and herein, Larry W. Rader, is an unnamed appellant and petitioner in the caption.**

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** Note: Petitioner Fries has had the advice of separate independent counsel on the merits of filing this Petition for Certiorari, and has so approved it.

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Petitioners Leo Fries and his counsel of record respectfully request that a writ of certiorari be issued to review the decision, conclusion, judgment, order denying rehearing and mandate of the United States Court of Appeals for the Seventh Circuit in this case affirming the district court judgment.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Fries v. Helsper*, __ F.3d __ (7th Cir. 1998) (App. A). The decisions of the district court were not reported (as of now) (97-C-0326, E.D. Wis. 1997) (App. C & D).

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on June 1, 1998. The Court of Appeals denied a timely petition for rehearing on July 1, 1998 (App. H) and issued its mandate July 9, 1998 affirming the district court decisions (App. C & D) and judgment (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Rule 29.4(b) or (c) of this Court is not applicable.

## CONSTITUTIONAL AND STATUTORY LAWS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment also provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person equal protection of the laws.

42 U.S.C. § 1983 appears in Appendix I of this petition.

28 U.S.C. §§ 455(a) and 455(b)(1) appears in Appendix I of this petition.

Federal Rules of Civil Procedure, 28 U.S.C. (relevant complaint requirements):

> Rule 8(a) "a short and plain statement of the claim showing the pleader is entitled to relief,"
>
> Rule 8(f) "[A]ll pleadings shall be construed to do substantial justice."
>
> Rule 12(b)(6) provides for dismissal of complaint for "failure to state a claim."

Rule 11 Sanctions appears in Appendix I of this petition.

Local Rule Section 7.07(a)(2), Mandatory Discovery, U.S. District Court for the Eastern District of Wisconsin appears in Appendix I of this petition.

## STATEMENT OF THE CASE

The court of appeals decision in this case under 42 U.S.C. § 1983 is belied by a sophisticated fraud of Fries' royalty by use of a deceptive corporate tradename, *Larson Manufacturing Company*, by three separate South Dakota corporations, namely

Larson Manufacturing Company of Iowa, Inc., Larson Manufacturing Company, Inc., and Larson Manufacturing Company which changed its name to Larson Manufacturing Company of South Dakota, Inc. in 1993, each owned separately and controlled by O. Dale Larson.

In 1996 Fries discovered that his earlier cases to recover royalties against "Larson Manufacturing Company"[1] (District Court cases 95-C-0266 and 95-C-0740, App. G & F) were based upon service of process on Larson Manufacturing Company, Inc., (LMCI). LMCI, a 1993 South Dakota corporation, had *no contract privity* with his 1984 royalty agreement with Larson Manufacturing Company, a 1964 South Dakota incorporated company which changed its name (unknown to Fries) to Larson Manufacturing Company of South Dakota, Inc. in 1993. Both companies were owned and controlled by O. Dale Larson who did not disclose the true entity in the state actions or in the federal court for the western district of Wisconsin. (App. E, 36a-38a, complaint pars. 4-9.)

In 1995 Fries obtained a "second legal opinion" on his pending invention royalty litigation against Larson Manufacturing Company (case 0266) from firm attorney George Richards of the Patterson law firm. (App. E, 39a, complaint pars. 17-18.)

---

1. The *only* Larson Manufacturing Company served in the prior federal cases was Larson Manufacturing Company, Inc. (Its registered agent in Wisconsin was a David Holzhueter; the process server served the wrong Holzhueter in the first Marathon County Circuit Court action 93C 784 filed by Attorney Molinaro in December 1993 which was dismissed in 1994. The complaint was refiled and the correct Holzhueter was served, and removed by Larson to federal court where it was assigned case No 95 C 0266.) Attorney Molinaro withdrew and Rader appeared for Fries in September 1995 with Attorney Schmidt (App. F & G).

On December 27, 1996 Fries filed an action in Marathon County Circuit Court (96 C 682) to vacate the dismissal of the first case filed and served on registered agent for Larson Manufacturing Company, Inc. in 1994 *for fraud on the court* and Fries for nondisclosure of the real corporate defendant. This suit named LMC-IA and LMCI based upon corporate documents that there were only two Larson companies. The complaint was amended after Attorney Helsper and the Patterson Law firm filed an answer alleging that the real defendant was never served, namely, Larson Manufacturing Company of South Dakota, Inc. who Fries immediately joined and served therein. (App. E, par. 10.)

Judge Kinney refused to hear the Fries motions to disqualify the Patterson law firm as former counsel to Fries and attorney Helsper because of the related case issues involving his royalty claim against "Larson Manufacturing Company." (App. E, par. 18.) The inference of wrongdoing flow from complaint allegations 4 & 5. (App. E 36a-37a.):

> 4. O. Dale Larson resides at Brookings, South Dakota and at times material hereto was the president, director and controlling shareholder of each of the LARSON companies identified in paragraph 2 above. The said "Larson Manufacturing Company" South Dakota corporations are not parent-subsidiary related but each has separate assets, liabilities and financial records.
>
> 5. Dale Larson caused Larson Manufacturing Company, Inc. (LMCI)) to be incorporated on June 30, 1993 in South Dakota, and then unlawfully obtained a certificate of authority to do business in Wisconsin which corruptly induced service on the wrong corporation, LMCI. LMCI pled the defense

of the statute of frauds and LMCI obtained the 1995 dismissal of case 95 C 0266 in the above district court. Defendant O. Dale Larson and his corporations knew that the Fries 1984 royalty contract was with Larson Manufacturing Company, a 1964 SD company, which changed its name on June 30, 1993 (sic) to Larson Manufacturing Company of South Dakota, Inc., which facts were not disclosed to Fries until 1997. O. Dale Larson knew LMCI had no privity of contract with Fries.

**A. The Section 1983 Case Procedural Docket**

Fries filed this § 1983 action on May 9, 1997. The clerk by random draw assigned District Judge John Shabaz, case no. 97 C 0326-S, and attached his Order to the complaint served on the defendants. (App. E 42a.) On May 23,1997 Defendants by attorney Paul David, a defendant with the Patterson Law Firm, filed a motion to dismiss for failure to state a claim for relief and filed a motion for sanctions on June 25, 1997. The parties proceeded to brief the case based upon the order governing motions by Judge Shabaz.

On July 1, 1997 (55 days after May 9) the district clerk sent plaintiff a notice of hearing on sanctions before Judge Crabb on July 16, 1997. (App. J 54a-55a.)

No notice of, or order for, assignment of the case to Judge Barbara B. Crabb, or change of case number, appears of record. On July 7, 1997 Fries immediately filed his motion and demand for removal/recusal of Judge Crabb.

On of July 15, 1997 Judge Crabb entered an "Opinion and Order" denying the motion for recusal, dismissing the complaint, but retaining jurisdiction to hear the motion on sanctions set for July 16, 1997. (App. D 24a.)

On July 15, 1997 Attorney David filed an affidavit for services rendered in behalf of *themselves*, the Patterson Law Firm, with a bill from defendant Attorney Richard J. Helsper to "Larson Manufacturing Company." On July 17, 1997 Judge Crabb entered an Order with opinion on sanctions (App. C 15a) after a short July 16, 1997 non-evidentiary hearing call at which Fries did not appear.

Judge Crabb erroneous found (App. C 17a), without correction by the defendant attorneys, that she had previously sanctioned Fries $1000 in prior case 95-C-0740 (dismissed by preclusion of 0266) involving his claim for royalty against Larson Manufacturing Company (App. F & G). Fries and counsel appeal(s) were timely filed and consolidated and decided by the Court of Appeals per decision of June 1, 1998. (App. A.)

**B. Standard of Review in Lower Courts**

On a Rule 12(b)(6) motion to dismiss all well-pleaded material allegations of the complaint are admitted, and only their legal sufficiency is denied; it must be shown that plaintiff is entitled to no relief under any state of facts. *Haines v. Kerner*, 404 U.S. 519 (1992); (*also see Kimes v. Stone*, 84 F.3d 1121, (9th Cir. 1996), involving a similar complaint against former attorneys and the judge.)

## REASONS FOR GRANTING THE WRIT

### I.

**THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE APPLICATION OF RULE 8(a) IN THE NINTH CIRCUIT COURT OF APPEALS BY APPLYING *PRECLUSIONARY* "BACKGROUND" FACTS TO DISMISS A COMPLAINT FOR FAILURE TO STATE A CLAIM FOR RELIEF UNDER RULE 12(b)(6) WHERE THE CONDUCT OF ATTORNEYS AND JUDGES IS INVOLVED IN THE CHALLENGED § 1983 COMPLAINT. *SEE KIMES ID.*, AND *DENNIS v. SPARKS*, 449 U.S. 25 (1980) (5TH CIR. APPEAL).**

The complaint sets forth a fair notice of the claim within the meaning of FRCP Rule 8(a). The Court of Appeals fails to cite any complaint allegations, disregards the above standard of review, and relies on preclusionary facts as background, stating:

> "To make this appeal understandable, we briefly discuss the background of this case and the litigation that preceded this action." * * * "With these facts and procedural history as background, we now turn to the issues presented for review."

(App. 2a & 6a.) To *Affirm* using "these facts" avoids Rule 8(a). Fries is denied equal protection of the laws of rights under § 1983 in the Seventh Circuit which also ignores the disparity of Rule 7 disclosures required in the Eastern District of Wisconsin District Court and the lack thereof in the Western District Court of Wisconsin. Citizens of the Western District of Wisconsin are denied equal protection of the laws under the

Fifth and Fourteenth amendments. *See* U.S. District Court, Eastern District Wisconsin Rule 7, Pretrial Procedure Section 7.07 Mandatory Discovery, subsection (a)(2)(i) & (ii). (App. I 50a-51a.)

The Court also did not apply the Rule 8(f) "substantial justice" construction to the complaint based upon an underlying complex scheme to defraud Fries of his royalty on his Magna Core storm door magnetic seal adapted in 1984 by Larson Manufacturing Company, which avoided suit by changing its legal name. (App. E 37a, Pars. 5-12.)

The scheme to defraud was generated by the use of three separate and distinct corporations in 1993 using the tradename "Larson Manufacturing Company." The corporation Fries sued in the prior federal court cases 0266 & 0740 was not the 1964 incorporated LMC, but an *entirely new and different corporation* incorporated in 1993 in South Dakota as Larson Manufacturing Company, Inc. and licensed in Wisconsin as of 1993 under a false application for an amended certificate of authority of yet a third company incorporated by Dale Larson in 1982 in South Dakota as Larson Manufacturing Company of Iowa, Inc. which became licensed to do business in Wisconsin in 1984.

The due course of justice was circumvented in prior suits which litigation is now exonerated by the Court of Appeals use of preclusionary background to bypass the § 1983 complaint.

Fries' substantive constitutional right to a full and fair opportunity to try his claim against the real party defendant was denied.

## II.

**THE PETITION SHOULD ALSO BE GRANTED AS THE COURT OF APPEALS DECISION HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED SUCH DEPARTURE BY THE LOWER COURT WHERE THE CONDUCT OF ATTORNEYS AND JUDGES IS INVOLVED IN THE CHALLENGED *CONFLICT OF INTERESTS* RULE ON USE OF FRIES FORMER ATTORNEY BY DEFENDANTS IN STATE ACTION SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.**

The Court of Appeals did not address the *Conflict of Interests* Rule. The allegations in the complaint on denial of fundamental due process requirements applicable to attorney disqualification in the state court were not reviewed de novo or addressed in the decision of the Court of Appeals, namely:

> **16.** On April 28, 1997 Fries filed a **Motion for Judgment** against **Larson Manufacturing Company of South Dakota, Inc.** which company had not filed for summary judgment, and which company the Larson answer alleged was the true corporate defendant in the 1994 default judgment. LMC-SD did not object to jurisdiction over it in 1994 under the default judgment or disclose it was the *true defendant* in 1994.
>
> 17. In support of his motion Fries attached his affidavit showing he had obtained a "second legal opinion" from attorney George Richards of the Patterson law firm in 1995 concerning his royalty claim and the pending suit against Larson.

> 18. On April, 29, 1997 Judge Kinney proceeded to grant summary judgment dismissal of the three Larson defendants, namely O Dale Larson, LMC-IA and LMCI. . . . Judge Kinney again ignored the Patterson firm attorney conflict of interest with Fries and their representation of the defendants.

(App. E 39a.)

**A. Wisconsin Has Adopted The "Substantial Relationship" Test In Attorney Disqualification Cases.**

*Berg v. Marine Trust Co.* 416 N.W. 2d (Wis. Ct. App. 1987) at 646-47 (quoting *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 558 F.2d 221 (7th Cir. 1978)) held:

> Simply stated, the test is as follows: "where an attorney represents a party in a matter in which the adverse party is that attorney's former client, the attorney will be disqualified if the subject matter of the two representations are "substantially related.' "

In *Berg* the court further held, 141 Wis. 2d at 890-91, 416 N.W. 2d at 649 (citing *Marketti v. Fitzsimmons*, 373 F. Supp. 637, 639 (W.D. Wis. 1974):

> We agree with Judge Doyle's observation that a lawyer's representation of an interest adverse to that of his former client in a matter substantially related to that involved in the former representation "would seem a breach of trust in the lay sense of justice," and that proof that no confidential information had been disclosed "would not remove the taint of disloyalty."

As a matter of law the Patterson firm attorneys was disqualified for disloyalty as reaffirmed in *Matter of Guardianship of Tamara L.P.*, 503 N.W. 2d 333, 337 (Wis. App. Ct. 1993). The Fries affidavit in support of his motion in the State court to remove the Patterson Law firm attorneys was uncontested. Judge Kinney proceeded to grant Larson summary judgment dismissing the Larson Manufacturing Company corporate defendants and ignored the Fries motion stating "Mr. Fries's motions don't make any difference to the decision of this case" without holding a hearing on the "conflicting-interests."

In *Ennis v. Ennis*, 276 N.W. 2d 341 at 348 the court said removal was *obvious* and no hearing on firm disqualification was needed where member firm attorney representing wife in divorce formerly represented the husband in same proceeding. It is irrelevant if confidential information is obtained to use against his former client, or if "different people in the firm handled the two matters and scrupulously avoided discussing them." *Analytica v. NFD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983).

The primary purpose in prohibiting attorneys from representing conflicting interests is to preserve confidential communications and client's confidence in attorney's loyalty to his cause. *First Wisconsin Mortg. Trust v. First Wis. Corp.*, 74 F.R.D. 625, 626 (1977), *affirmed*, 571 F.2d 390, *rehearing*, 584 F.2d 201 remanded on special issue.

In *First Wis. Mortg. Trust* the district judge first disqualified the law firm from representing the defendants *after a hearing and decision* finding the prior representation the attorneys interests adverse to the plaintiff. The court was left with the issue of what constitutes "representation" as applied to use of said attorneys' work product by successor attorneys. In

disqualification the court relied on the "conflicting-interests rule" test cited in *Marketti v. Fitzsimmons*, 373 F. Supp. 637, 639 (W.D. Wis. 1974) as adopted from *E.F. Hutton & Company v. Brown*, 305 F. Supp 371 (S.D. Texas 1969), stating at page 627:

> . . .What greater violation of that confidence could there be than for that attorney in a subsequent court proceeding to actively represent interests opposed to those of his former client?

What greater violation of Fries confidences in his consultation with attorney Richards of the Patterson law firm on his suit against *Larson Manufacturing Company* could there be? And, then there is also the related matter of the attorney client privilege.

The privilege is intended to promote "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), *and Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) cited recently in *Swidler & Berlin and Hamilton, Petitioners, v. United States*, (1998), pub. in U.S. Law Week, 66 LW 4538, No 97-1192.

The due *administration of justice* does not permit *silent avoidance* of client's claim of privilege by allowing the attorney to change sides, to sell out his interest and to represent the other side in the disputed matter. The inference of its use by Helsper and Patterson law firm counsel to conceal the merits of the Fries claim by diverse means and its "appearance of impropriety" is evident from the complaint. *Kimes, supra*, n.3 at 1127.

**B. "A Fair Trial In A Fair Tribunal"**

*In re Murchison,* 349 U.S. 133, 136, 75 S. Ct. 623 (1955) mandates that under the Due Process Clause no judge can be permitted "to try cases where he has an interest in the outcome." It follows also that an attorney, as an officer of the court, cannot *switch clients* in the same related case matter and *try the case* without breaching the basic constitutional requirement of "a fair trial in a fair tribunal." enunciated by Judge Black in *Murchison,* 349 U.S. at 136. The attorney has a monetary interest (fees) with the Larson defendants' case. To allow the former attorney to use the confidential relationship to directly or indirectly against a former client violates all sense of fairness in a *system of law* which Justice Black stated above in 349 U.S. at 136, *has always endeavored to prevent even the probability of unfairness.* Confirmed in *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813, 106 S. Ct. 1580 (1986). The trial judge who allows such attorney to try the case is a "willful participant" and the "understanding to deprive plaintiff of his due process rights" is self evident if not inferred from the conduct of Judge Kinney.

Thus, the decision written by Judge Bauer misapplies *Starnes,* 39 F.3d at 1397, and *Adickes*, 398 U.S. at 152 as cited at App. 8a, viz: Judge Kinney did act under color of state law to deprive Fries of his property without due process of law in the circuit court proceeding by allowing the Fries former attorneys to proceed against Fries. The same "monetary interest" in the proceeding applies also to Attorney Helsper because of his conduct in the fraud alleged in the circuit court complaint. To excuse his conduct as "mere invocation of state legal procedures" is to ignore fundamental due process rights protected by both the Fifth and Fourteenth amendments. *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 624, 111 S. Ct. 2077 at 2084 (1991) held that a judge is a state actor,

and a private party who is allowed to exclude black jurors in a civil case had the "overt, significant assistance of the court." Such assistance is evident herein from the complaint. Judge Kinney, the district court, and now the Court of Appeals have denied the rights of due process of Fries preserved under the Fifth and Fourteenth amendments to the Constitution with *the overt, significant assistance* of the courts in allowing the attorneys to proceed not withstanding their conflict of interest and the state court judge's denial of a hearings on their removal and related procedural motion as alleged in the complaint.

**C. The *Forbidden Fruit* Of Larson Using Fries' Former Counsel**

The only Larson corporate defendant served in the prior federal cases was the 1993 Larson Manufacturing Company, Inc. which had no privity or records with the Fries royalty agreement. The 1964 Larson Manufacturing Company *in privit* also changed its name in 1993 to Larson Manufacturing Company of South Dakota, Inc., but never had a registered agent in Wisconsin as the answer in 1997 admits. LMC-SD was not served as stated in the Court of Appeals decision "Background." (App. 2a.)

The 1996 case 682 filed in Marathon County Circuit Court (assigned to Judge Kinney) was an independent action to set aside a judgment obtained by fraud under Wis. Stats, 806.07(2). Such right of action was confirmed in *Walker v. Tobin*, 209 Wis. 2d 72, 565 N.W. 2d 266 (Ct. App. 1997). Defendants interference with Fries due process rights in case 682 challenging the prior judgments of dismissal is the critical issue.

The present federal action was filed as a section 1983 complaint because the trial judge violated the due process rights of Fries in plain view. Judge Kinney allowed Attorney Helsper

(who is charged with fraud in not disclosing the real Larson corporation defendant in the federal cases 0266 & 0740) to appear in Wisconsin without a *pro hac vice* order and use the *forbidden fruit* of former counsel.

## III.

## THE PETITION SHOULD BE GRANTED BECAUSE JUDGE BARBARA B. CRABB HAD NO AUTHORITY TO DECIDE THE MOTION TO DISMISS OR TO IMPOSE SANCTIONS IN THE CASE ASSIGNED TO JUDGE SHABAZ ON MAY 9, 1997.

In *United States v. Heath*, 103 F. Supp. 1, p. 3 (D.C. Hawaii 1952) the court held:

> No express or implied power is granted a chief judge to affect administratively, directly or indirectly, litigation assigned to and pending before another judge of the court. 28 U.S.C.A. §§ 136, 137, 756.

No notice of a "clerk error" was sent by the Clerk to counsel of mistaken assignment. We only have Judge Crabb's decision (App. D). U.S. District Court Judge Barbara B. Crabb had no power in Judge Shabaz's case after 55 days, even assuming an error in assignment in a § 1983 case, without any order of reassignment to Judge Crabb.

Where is the letter to counsel advising Fries in a *civil manner* that a clerk's error occurred in the judicial assignment, or lottery process, or the notice to challenge such reassignment? Why did Judge Crabb file a notice of hearing on sanctions on July 1, 1997 set for July 16, 1997 when her decision on the merits of the recusal motion (filed July 9) and the motion to dismiss was dated July 15, 1997; the latter was not delivered to Fries before

the hearing for proper analysis and response. Defendants affidavit on fees was also filed on July 15 without due notice to Fries. Judge Crabb had no power in the Fries case, or to impose sanctions for challenging that power.

**A. Improper Imposition of Rule 11 Sanctions**

Finally, sanctions are not warranted under the facts and law of this case. The decision of the Court of Appeals dated June 1, 1998 does not address the issues of bias of the district judge under *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147 (1994) who falsely found that she had sanctioned Fries $1000 previously in prior decisions. (App. G & F.)

The judge's response to the influence by prior Democratic party promotions as a bias in favor of Democratic Party contributor O. Dale Larson was not impartially decided as argued under the circumstances by Fries. Inferences of wrongful conduct were ignored.

Justice Kennedy, concurring in ***Liteky v. United States,*** 114 S. Ct. 1147, 1161 (1994), stated:

> A judge may find it difficult to put aside views formed during during some earlier proceeding. In that instance we would expect the judge to heed the judicial oath and step down, but that does not always occur. If through obduracy, honest mistake, or simple inability to attain self-knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source. As I noted above, the central inquiry under § 455(a) is the appearance of partiality, not its place of origin.

The issue of Judge Crabb's lack of authority to hear the case once it was assigned by lottery draw to Judge Shabaz cannot be summarily dismissed as a clerk's error. Fries motion to recuse herself was not a frivolous motion as stated in the decision of the Court of Appeals. Sanctions were improper as there were good faith issues raised under the civil rights act in behalf of Fries. The district judge did not allow a "reasonable opportunity to respond" to her decision on the merits dated the day before the hearing on sanctions under Rule 11(c). The record supports a *disqualifying predisposition* or bias against Fries on the part of Judge Crabb requiring removal from the case in any event.

## CONCLUSION

This case presents issues of exceptional importance in the protection of litigant's due process rights and the due administration of justice in the federal judiciary, particularly, where the conduct of attorneys and judges is challenged. The state court, without notice or hearing, ignored the attorney client "conflicting-interests rule" and proceeded to dismiss the royalty claim without due process of law against the only Larson corporation *in privity* with the Fries invention royalty. The Court violated Rules 8(a) and 8(b)(6) and the Order of Judge Shabaz by considering facts not in the complaint. The allegations of Par. 22 of the complaint are not "*conclusory*:"

> The said defendants and said judge (Kinney) did conspire to proceed with an unlawful hearing knowing of the attorney client conflict of the Patterson law firm all in violation of Fries due process rights, and further knowing that Larson and Helsper and David/Patterson Law Firm defendants' had filed false answers with respect to the documents on file in the office of the Wisconsin Secretary of State as set forth in the Fries motion to strike.

The Fries complaint and motions were warranted under Rule 11(b) and were not baseless filings in the district court under § 1983.

We respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

LARRY W. RADER
*Attorney for Petitioner*
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123 Grand Avenue
Wausau, WI 54402
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# APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 1, 1998

# In the United States Court of Appeals

## For the Seventh Circuit

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Nos. 97-2796, 97-2846, 97-2908 & 97-3142

LEO FRIES,

*Plaintiff-Appellant,*

*v.*

RICHARD J. HELSPER, HELSPER & RASMUSSEN, P.C., a South Dakota corporation, PAUL DAVID, GEORGE RICHARDS, C. DUANE PATTERSON, PATTERSON RICHARDS HESSERT WENDORFF & ELLISON, a Wisconsin law firm, and O. DALE LARSON,

*Defendants-Appellees.*

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Appeals from the United States District Court
for the Western District of Wisconsin.
No. 97 C 326—**Barbara B. Crabb**, *Judge.*

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ARGUED FEBRUARY 20, 1998—DECIDED JUNE 1, 1998

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Before, BAUER, RIPPLE, and ROVNER, *Circuit Judges.*

BAUER, *Circuit Judge.* Leo Fries filed this action under § 1983 of the Civil Rights Act, 42 U.S.C. § 1983, alleging that the defendants conspired with a state court judge and acted under color of state law to deprive him of his Fourteenth Amendment right to due process of law. The district court judge denied plaintiff's motion for her removal or recusal, dismissed his complaint for failure to state a claim, and imposed sanctions. Fries appeals, and we affirm.

*Appendix A*

## BACKGROUND

To make this appeal understandable, we briefly discuss the background of this case and the litigation that preceded this action. In the initial lawsuit, Fries sued Larson Manufacturing Company ("the Company") in federal district court for royalty payments resulting from the Company's alleged use of a component designed by Fries in the manufacture of storm doors. Initially, Fries obtained a default judgment against Larson Company, but it was discovered that he had not served the Company's registered agent, and, therefore, the court had never obtained jurisdiction over Larson Company. When the Company received notice of the default judgement, it immediately filed a motion to vacate the judgment. In light of the Company's motion, Fries and Larson Company stipulated to (1) an order vacating the default judgment and (2) the dismissal of the action without prejudice.

In the second lawsuit, Fries filed an identical complaint in federal district court and properly served the Company's registered agent. Larson Company defended the suit on its merits and moved for summary judgment. The district court granted the Company's motion and dismissed the complaint. Fries then filed a third lawsuit, again in federal court, alleging that various individuals, including some of the current defendants, had fraudulently conducted the litigation in the previous action. The defendants to that action moved for summary judgment, and the district court dismissed the complaint.[1] In a fourth lawsuit, Fries filed a complaint in Wisconsin state court, alleging that he was defrauded out of his default judgment originally entered in the first lawsuit. He argued that Larson Company fraudulently induced him to voluntarily dismiss the default judgment. The state court granted the defendants' motion for

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[1] Fries appealed the dismissal of his complaints in the second and third lawsuits, and this court affirmed the district court's dismissal of each complaint.

summary judgment and imposed sanctions against Fries and his attorney for filing a frivolous lawsuit. However, before the court entered its final order dismissing the complaint, Fries filed yet another lawsuit; it is this action that is the subject of this appeal.

In this fifth lawsuit, Fries asserts a § 1983 civil rights action in federal district court against Richard J. Helsper, Helsper & Rasmussen, P.C., Paul David, George Richards, C. Duane Patterson, Patterson Richards Hessert Wendorff & Ellison, and O. Dale Larson (collectively "the defendants"),[2] charging them with violating his constitutional rights and unlawfully depriving him of his property. Specifically, the complaint alleged that the defendants acted under color of state law and conspired with Wisconsin State Court Judge Robert Kinney to obtain the dismissal of Fries's complaint without due process of law. When the instant complaint was filed, the case was randomly assigned to Judge John Shabaz. The defendants then filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the parties proceeded to brief the case. However, after the briefing schedule was set, the clerk of the district court discovered a clerical error and determined that the assignment of the case to Judge Shabaz departed from routine assignment procedures; the case originally should have been assigned to Judge Barbara Crabb because the parties had previously appeared before

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[2] Richard J. Helsper, a partner in Helsper & Rasmussen, represented the Larson Company in previous litigation involving Fries's lawsuits. Larson Company retained Paul David, George Richards, and C. Duane Patterson, attorneys with the law firm of Patterson Richards Hessert Wendorff & Ellison, as local counsel in the Wisconsin state court litigation. O. Dale Larson is an officer of Larson Company. The law firms and the individuals are named as defendants in the present case for their participation, in some capacity, in the preceding state court litigation.

her.[3] Once the error was discovered, the case was reassigned to Judge Crabb.

Subsequent to the reassignment, the defendants filed another motion, a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, and requested the district court to set a hearing date to consider its request. Fries received notice from the court clerk that a hearing was scheduled for July 16, 1997 before Judge Crabb, and he immediately questioned why a hearing was set before Judge Crabb and not Judge Shabaz. Fries responded by filing a motion for the removal or recusal of Judge Crabb pursuant to 28 U.S.C. § 455,[4] arguing that: (1) Judge Crabb did not have the authority to decide the defendants' motions because the case was assigned to Judge Shabaz; (2) Judge Crabb lacks impartiality because in previous claims involving the current parties she entered improper and arbitrary rulings; and (3) as a member of the Democratic Party, Judge Crabb is biased by her knowledge of defendant Dale Larson's support of and contributions to the Party.

In a memorandum opinion and order entered on July 15, 1997, Judge Crabb declined to disqualify herself and then dismissed the complaint for failure to state a claim upon which relief could be granted. In consideration of plaintiff's motion for her removal or recusal, she explained that there had been a clerical error in the initial assignment of the case to Judge Shabaz; the case should have originally

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[3] The Western District of Wisconsin uses a lottery system to randomly assign cases, with the exception that when parties have already appeared before a particular judge, all efforts are made to assign any future litigation involving those parties to the same judge.

[4] Section 455(a) requires a judge to disqualify herself in any proceeding in which her impartiality "might reasonably be questioned," and § 455(b)(1) requires disqualification in a case when the judge has a "personal bias or prejudice concerning a party." 28 U.S.C. § 455.

been assigned to her. After the mistake was discovered, the case then was assigned to her. Judge Crabb also rejected Fries's additional arguments demanding her disqualification, finding that no reasonable person would believe his "balderdash" allegations of bias and impropriety. Therefore, Judge Crabb determined that she had proper jurisdiction and authority to rule on the defendants' motions, and finding no conceivable set of facts under which the defendants could have been acting under color of state law, she dismissed Fries's complaint.

In a motion hearing the next day, Judge Crabb considered defendants' request for sanctions; they submitted affidavits which documented and explained the attorneys' fees and expenses incurred in defending this lawsuit. Although they had received notice of the hearing, neither Fries nor his lawyer attended, and as a result, there were no objections to the affidavits submitted or the fees and expenses requested. The following day the district court granted the defendants' motion and imposed sanctions on Fries and his lawyer for filing a frivolous lawsuit. The district court determined that defendants David, Richards, and Helsper incurred various expenses and had to forgo other opportunities in preparing and presenting their defense and that of their co-defendants and, therefore, were entitled to reimbursement for those expenses and lost opportunities. Accordingly, the district court awarded reasonable attorneys' fees and costs to the defendants in the amount of $5,779.64 and also permanently enjoined Fries from filing another lawsuit in federal district court based on a claim that he is entitled to royalty payments from Larson Company.

Fries filed timely notices of appeal.[5] On appeal, Fries argues that: (1) Judge Crabb did not have the authority to decide either the defendants' motion to dismiss or their motion for sanctions; (2) the sanctions were frivolous and

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[5] On July 30, 1997, this court entered an order to consolidate Fries's appeals for purposes of briefing and disposition.

imposed without notice; and (3) the district court erroneously dismissed the complaint for failure to state a claim for relief. With these facts and the procedural history as background, we now turn to the issues presented for review.

## ANALYSIS

As a preliminary matter, to the extent that Fries's arguments, which challenge the authority of Judge Crabb to decide the motions and question her ability to remain impartial, deserve any comment, we find the arguments meritless and undeserving of a detailed discussion. The record clearly illustrates that Judge Crabb had proper authority to decide the motions. Pursuant to the case assignment system implemented in the Western District of Wisconsin, it was an obvious clerical error for the case to be assigned to Judge Shabaz. That error was corrected by the reassignment of the case to Judge Crabb; there was absolutely nothing illicit or irregular about the reassignment. Accordingly, we agree that Judge Crabb had the authority to hear and to rule on the motions.

As to Fries's remaining arguments which question Judge Crabb's impartiality and impugn her character, our review of these arguments requires no other comment except to emphasize that there is no evidence of a personal bias, and we have no doubt that Judge Crabb's impartiality was not compromised by any personal prejudice. Accordingly, we agree that Fries's motion to disqualify Judge Crabb was frivolous; jurisdiction was proper. Judge Crabb had the authority to rule on defendants' motions, to dismiss plaintiff's complaint, and to impose sanctions. Let us now turn to the remaining issues on appeal.

We review a district court's decision to grant a motion to dismiss for failure to state a claim *de novo*. *Starnes v. Capital Cities Media, Inc.*, 39 F.3d 1394, 1395 (7th Cir. 1994). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of

facts in support of his claim that would demonstrate an entitlement to relief. *Vickery v. Jones*, 100 F.3d 1334, 1344 (7th Cir. 1996). When analyzing the dismissal of a complaint under Rule 12(b)(6), we accept the factual allegations contained in the complaint as true and construe them in the light most favorable to the plaintiff. *Wiemerslage Through Wiemerslage v. Maine Township High Sch. Dist. 207*, 29 F.3d 1149, 1151 (7th Cir. 1994). At a minimum, a complaint must contain facts sufficient to state a claim as a matter of law, and mere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss. *House v. Belford*, 956 F.2d 711, 721 (7th Cir. 1992).

The purpose of § 1983 is to deter state actors, and private individuals in collaboration with state officials, from using a "badge of authority" to deprive individuals of rights guaranteed by the Constitution. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). If such a deprivation occurs, § 1983 provides relief to victims who suffer that deprivation. *Id.* Specifically, the cause of action requires:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To state a valid cause of action under § 1983, a plaintiff must demonstrate that: (1) the defendant(s) deprived him of a right secured by the Constitution or any law of the United States; and (2) the deprivation of that right resulted from the defendant(s) acting under color of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). For an individual to act under color of law, there must be evidence of a *concerted effort* between a state actor and that individual. *Id.* at 152; *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7th Cir

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1985) (emphasis added). To establish § 1983 liability through a conspiracy theory, a plaintiff must demonstrate that: (1) a state official and private individual(s) reached an understanding to deprive the plaintiff of his constitutional rights, *Starnes*, 39 F.3d at 1397; and (2) those individual(s) were "'willful participant[s] in joint activity with the State or its agents.'" *Adickes*, 398 U.S. at 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

In this appeal, Fries argues that the defendants conspired with Judge Kinney and acted under color of state law to deprive him of his property without due process of law. Fries cites the Supreme Court's decision in *Dennis v. Sparks*, 449 U.S. 24 (1980), to support his conspiracy theory and explains that "[p]rivate persons, jointly engaged with state officials in the challenged action, are acting under color of law for purposes of § 1983." 449 U.S. at 27-28. Fries claims that Judge Kinney conspired with the defendants to either conceal or destroy certain court documents to deprive him of his royalty payments, and asserts that Judge Kinney's failure to rule on some of the motions plaintiff had filed also resulted from the defendants' influence. In light of the alleged conspiracy and "joint action," Fries argues that the complaint sufficiently states a claim for relief under § 1983.

Although Fries correctly restated the Court's conclusion that, generally, private individuals act under color of law when jointly acting with a state official to deprive some person of his constitutional right, see *Dennis*, 449 U.S. at 27-28, he failed to mention the Supreme Court's remark immediately following: "[o]f course, merely . . . being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.* In an attempt to state a claim for relief under § 1983, Fries included only accusations and conclusory allegations that the defendants conspired with Judge Kinney and influenced his decisions. As the district court articulated in its opinion, mere allegations of joint action or a conspiracy do not

demonstrate that the defendants acted under color of state law and are not sufficient to survive a motion to dismiss. Moreover, plaintiff's complaint is unclear as to how the defendants' conduct was connected to Judge Kinney's alleged failure to act on some of the motions and, as a result, qualified as state action. Nothing in the complaint demonstrates the existence of any joint action, concerted effort, or even a general understanding between Judge Kinney and the defendants. In sum, we agree with the district court's determination that Fries failed to demonstrate that the defendants acted under color of law; it was appropriate for the district court to dismiss Fries's complaint.

Although it is unnecessary to address the second element required to state a claim for relief under § 1983, nonetheless, Fries also failed to establish that additional requirement—he failed to demonstrate that he was deprived of due process of law. To the contrary, the record clearly illustrates that Fries received more than sufficient process of law. This lawsuit is the fifth complaint filed by Fries that includes allegations related, if not identical, to those previously asserted in an attempt to relitigate his claim to royalty payments from the Larson Company. In fact, previous complaints have been dismissed by the district court, and those dismissals affirmed by this court—not once, but twice. Fries had his day in court and has been rendered due process of law.

Next, we consider the district court's order imposing sanctions on Fries and his lawyer; we review the district court's imposition of sanctions for an abuse of discretion. *Matter of Generes*, 69 F.3d 821, 827 (7th Cir. 1995). One of the basic purposes of Rule 11 of the Federal Rules of Civil Procedure is to "to deter baseless filings in the district court . . . ." *Cooter & Gell v. Hartmarx Corp., et al.*, 496 U.S. 384, 393 (1990). Specifically, Rule 11 requires that an attorney and/or party certify to the best of their "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that any pleading or

motion presented to the court is not being presented for an improper purpose and that the allegations and other factual contentions have a legally sufficient basis to support the claim. As a preliminary matter, when a party requests a court to impose sanctions, it must first give notice of its intent to seek sanctions and provide the attorney or party charged with a reasonable opportunity to respond. FED. R. CIV. PRO. 11(c). Then, a district court determines whether there has been a violation of Rule 11 to warrant the imposition of sanctions, *id.*; a court may impose sanctions on a party for making arguments or filing claims that are frivolous, legally unreasonable, without factual foundation, or asserted for an improper purpose. In particular, a frivolous argument or claim is one that is "baseless and made without a reasonable and competent inquiry." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc).

On appeal, Fries first argues that he did not receive proper notice of defendants' intent to seek sanctions, and therefore, the imposition of sanctions is improper. Fries also claims that the award of sanctions resulted from Judge Crabb's pervasive bias, and he asserts that her decision to impose sanctions illustrates her prejudice and qualifies as "egregious conduct." Accordingly, Fries argues that the district court's decision to impose sanctions should be reversed.

We address Fries's first argument: after the defendants filed the motion for sanctions and requested the court to schedule a hearing, the district court informed the parties on July 1, 1997 that a motion hearing was scheduled for July 16, 1997. Clearly, Fries and his attorney had sufficient notice to prepare for the hearing, and consequently, plaintiff's first argument must fail. With regard to the remaining arguments, we first recognize that not only has Fries entangled multiple defendants in duplicitous litigation based on unfounded allegations, he also has impugned the integrity of a state court judge as well as the reputa-

tion of a federal district court judge with total disregard for the truth. As we determined above, Fries had no basis in fact or law to dispute the integrity of Judge Crabb or to suggest that the defendants conspired with Judge Kinney to deprive him of royalty payments. These scurrilous allegations are unfounded; the only evidence of improper conduct consists of the plaintiff's own baseless accusations that court officials were personally biased and abused their authority and that a conspiracy existed. *See Anderson v. County of Montgomery*, 111 F.3d 494, 501 (7th Cir. 1997).

The "evidence" presented by Fries and his lawyer to demonstrate that the district court judge's decision was tainted by prejudice and that the state court judge's course of action resulted from a conspiracy with the defendants is absent and that lack of factual foundation warrants the imposition of sanctions. We agree with the district court that an award of $5,779.64, in addition to the permanent injunction,[6] are appropriate sanctions. The district court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person(s). FED. R. CIV. PRO. 11, Advisory Committee's Notes (1993 Amendments). As the district court articulated, Fries has abused the legal process and harassed these defendants long enough in his relentless pursuit to obtain royalty payments from Larson Company. Based on the facts of this case, the district court acted within its discretion when it imposed sanctions on Fries and his lawyer for filing a frivolous lawsuit.

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[6] Although Rule 11 does not enumerate the factors a court should consider in deciding whether to impose sanctions or what sanctions would be appropriate in the circumstances, the rule specifically notes that a sanction may be non-monetary as well as monetary. FED. R. CIV. PRO. 11.

## CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of plaintiff's motion for removal or recusal, the dismissal of plaintiff's complaint for failure to state a claim, and the imposition of sanctions.

A true Copy:

Teste:

_____

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN FILED JULY 22, 1997

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

Case No: 97-C-0326-C

LEO FRIES,

Plaintiff,

v.

RICHARD J. HELSPER; HELSPER & RASMUSSEN, P.C., a South Dakota Corporation; PAUL DAVID; GEORGE RICHARDS; C. DUANE PATTERSON; PATTERSON, RICHARDS, HESSERT, WENDORFF & ELLISON, a Wisconsin law firm; and O. DALE LARSON,

Defendants.

## JUDGMENT IN A CIVIL CASE

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

## IT IS ORDERED AND ADJUDGED

that the motion to dismiss defendants Richard J. Helsper, Helsper & Rasmussen, Paul David, George Richards, C. Duane Patterson, Patterson, Richards, Hessert, Wendorff & Ellison and O. Dale Larson is GRANTED.

*Appendix B*

IT IS FURTHER ORDERED that the motion of plaintiff Leo Fries for recusal or removal of U.S. District Judge Barbara B. Crabb is DENIED.

IT IS FURTHER ORDERED that defendants' motion for Rule 11 sanctions is GRANTED, and plaintiff Leo Fries and his attorney, Larry Rader, are to pay defendants Richard J. Helsper; Helsper & Rasmussen, a South Dakota Corporation; Paul David; George Richards; C. Duane Patterson; Patterson, Richards, Hessert, Wendorff & Ellison, a Wisconsin law firm; and O. Dale Larson the sum of $5,779.64 no later than October 1, 1997. Because both Fries and Rader are responsible for the frivolous and harassing filings in this case, their responsibility for the sanction award is joint and several.

IT IS FURTHER ORDERED that plaintiff Leo Fries is enjoined permanently from filing any lawsuit in this court based upon his claim that he is entitled to royalty payments for his magnetic-seal process for storm doors, unless he obtains advance permission from the court to do so.

Approved as to form this 21st day of July, 1997.

s/ Barbara B. Crabb
BARBARA B. CRABB
U.S. DISTRICT JUDGE

s/ Joseph W. Skupniewitz — JUL 22 1997
Joseph W. Skupniewitz, Clerk of Court — Date

## APPENDIX C — ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN FILED JULY 17, 1997 AND JULY 26, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

97-C-0326-C

LEO FRIES,

Plaintiff,

v.

RICHARD J. HELSPER; HELSPER & RASMUSSEN, P.C. a South Dakota Corporation, PAUL DAVID; GEORGE RICHARDS; C. DUANE PATTERSON; PATTERSON, RICHARDS, HESSERT, WENDORFF & ELLISON, a Wisconsin law firm; and O. DALE LARSON,

Defendants.

ORDER

A hearing was held in this case on July 16, 1997, at 1:00 p.m., before United States District Judge Barbara B. Crabb on defendants' motion for the imposition of sanctions pursuant to Fed. R. Civ. P. 11. Plaintiff did not make any appearance, either in person or by counsel, although his counsel had been sent notice of the hearing. Defendants appeared by Paul David. (Shortly after the hearing concluded, I became aware for the first time that earlier in the day, plaintiff had filed a notice of appeal and a request for stay of all further proceedings with the Court of Appeals for the Seventh Circuit. Although requests for a stay are generally to

be filed in the district court, Fed. R. App. P. 8 (a) provides that in instances in which application to the district court is not practicable, a motion for stay may be filed with the court of appeals. Plaintiff stated in his motion that application to the district court would be futile in view of [Judge Crabb's] conduct in denying [plaintiff] his due process rights." To the best of my knowledge, the court of appeals has not granted the stay and it is unlikely that it would, given the lack of any apparent basis for granting the request.)

Defendants' Rule 11 request is properly before the court. In compliance with the rule's requirements, defendants served plaintiff with their motion for sanctions at least twenty days before filing it with the court, giving plaintiff an opportunity to withdraw the complaint without incurring sanctions. At the time, defendants advised plaintiff that they believed his complaint had been filed for the purpose of harassing defendants and increasing the cost of litigation needlessly and that the claims in the complaint were not warranted by existing law or facts. Defendants told plaintiff that they would seek the strongest sanctions available at law in an effort to deter plaintiff and his attorney from continuing to file frivolous lawsuits against defendant Larson and persons associated with him and that they would ask the court to enter an injunction against plaintiff and his attorney prohibiting them from filing any more cases raising the same claim against the same or related defendants.

From my review of the record in this case and in the two cases plaintiff filed previously in this court, I am persuaded that defendants are correct. A significant sanction must be imposed upon plaintiff and his attorney if they are to be deterred from continuing to harass defendants by the filing of lawsuits in which plaintiff tries to relitigate the same claim in varied guises. Although

*Appendix C*

I imposed a sanction of $1000 upon plaintiff in connection with his second effort to sue in federal court, it did not stop him from filing a third suit. No sanction less than the full amount of the attorney fees and costs incurred by defendants is likely to deter him and his attorney from continuing to file successive complaints raising the same claim. It is questionable whether even this sanction will be effective since he has failed to pay the earlier one, making it appropriate to enter an injunction prohibiting him from filing any additional complaints based upon his claim that he has been denied compensation for his invention of a magnetic-seal process used on storm doors.

I have examined the itemization of hours expended and costs incurred in the defense of this case. Defendants seek compensation for work performed by Paul David and other members of the Patterson, Richards, Hessert, Wendorff & Ellison law firm in defending the case and reimbursement for costs in the amount of $3,673.24 for work not including preparation for the hearing on sanctions, plus $1337.50 for work performed in connection with the hearing on the motion for sanctions and travel costs of $112.00. They seek compensation for work performed by Richard Helsper and reimbursement of expenses in the total amount of $656.90. The hours expended are reasonable, as is the hourly rate charged by each of the lawyers ($125 for Paul David and GA. Richards and $105 for Richard Helsper). The costs are appropriate to the nature of the defense. Although some of the defendants represented themselves and other defendants, that is no reason to deny the fee award they have requested. The policy arguments that support the denial of fee awards to lawyer-litigants under fee shifting statutes such as 42 U.S.C. § 1988 do not apply to lawyers who represent themselves as defendants in suits they did not choose to bring. *Cf. Kay v. Ehrler,* 499 U.S. 432, 437 (1991) (§ 1988 reflects overriding congressional concern in

obtaining truly independent counsel for victims of civil rights violations). For one thing, it can be presumed that they know how to evaluate the risks and disadvantages of representing themselves. *Cf. id.* (Congress aware in passing § 1988 that ("[e]ven skilled lawyer who represents himself is at a disadvantage in contested litigation). In taking on their own defense and that of their co-defendants, defendants David, Richards and Helsper had to forgo other opportunities and incur expenses. They and their firms are entitled to reimbursement for these lost opportunities and expenses.

Rule 11 sanctions may be imposed upon either the lawyer who filed the frivolous pleading or upon the party on whose behalf it was filed or both. I believe it is proper to impose the sanctions jointly upon plaintiff and upon his lawyer. That plaintiff is the moving force behind this litigation is clear from the two previous cases he filed, neither one of which involved his present attorney. On the other hand, his attorney signed the moving papers even though he has the benefit of a legal education as well as an independent responsibility not to file papers that are frivolous, harassing or without legal or factual basis. And whereas an unrepresented plaintiff might be accused for making unsupported allegations about judges and about other lawyers, *Anderson v. County of Montgomery*, 111 F.3d 494, 501 (7th Cir. 1997) ("Judges often see unrepresented prisoners claim that everyone connected with their cases — including court reporters — participated in grandiose conspiracies to violate their rights. . . . It is a rare event, though, to see a licensed attorney proffering claims of this sort, which impugn the honesty of court officers."), plaintiff's counsel, Larry Rader, has no such justification.

Rader signed the complaint in this case, although he should have known that it had no basis in fact or law, he vouched for the

truthfulness of the allegations that Judge Robert E. Kinney, a state circuit judge, had conspired to deprive plaintiff of his royalty claim, to conceal or destroy court documents and to proceed with unlawful hearings; and, in a motion for my recusal, he alleged that I was an official of the Democratic party and used my position as a judge to advance the interests of major contributors to the party. Rader had no factual bases for making these scurrilous allegations about Judge Kinney or about me. In addition to imposing monetary sanctions upon him, I intend to submit to the Board of Professional Responsibility of the State Bar of Wisconsin a copy of the opinion and order entered herein on July 15, 1997 and a copy of this order so as to enable the board to consider whether Rader's conduct in this case makes him subject to additional sanctions.

Plaintiffs allegation that I lack any authority to hear this case because it was assigned originally to Judge Shabaz is not scurrilous, but it is baseless. As the attached local order demonstrates, it is the practice of this court to assign all cases filed by the same party to the same judge.

Finally, I note that Rader is not a member of the bar of this court. Although he will be allowed to continue to act in this case, he will not be permitted to act in any other case unless and until he becomes a member of the bar of the court. In order to do that, he will have to satisfy this sanction order.

ORDER

IT IS ORDERED that plaintiff Leo Fries and his attorney, Larry Rader, are to pay to defendants Richard J. Helsper; Helsper & Rasmussen, a South Dakota Corporation; Paul David; George Richards; C. Duane Patterson; Patterson, Richards, Hessert,

*Appendix C*

Wendorff & Ellison, a Wisconsin law firm; and O. Dale Larson the sum of $5,779.64 no later than October 1, 1997. Because both Fries and Rader are responsible for the frivolous and harassing filings in this case, their responsibility for the sanction award is joint and several.

FURTHER, IT IS ORDERED that plaintiff Leo Fries is enjoined permanently from filing any lawsuit in this court based upon his claim that he is entitled to royalty payments for his magnetic-seal process for storm doors, unless he obtains advance permission from the court to do so.

Entered this 17th day of July, 1997.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

*Appendix C*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

IN THE MATTER OF
ASSIGNMENT OF CASES TO
JUDGES ORDER BY THE CLERK'S OFFICE

ORDER

The Clerk of Court is hereby directed to implement a case assignment system for the court pursuant to the guidelines in this order.

1. Except as otherwise provided in this order, random selection will control the assignment of cases. The Clerk of Court shall establish separate random assignment boxes for criminal cases, pro se civil cases, and non-pro se civil cases. At the present time in the criminal category, 50 percent of the cases are to be assigned to Chief Judge Barbara B. Crabb and 50 percent of the cases are to be assigned to District Judge John C. Shabaz. At the present time in the civil categories, 45 percent of the cases are to be assigned to Chief Judge Barbara B. Crabb and 55 percent of the cases are to be assigned to District Judge John C. Shabaz. From time to time the percentage of cases assigned to each judge may vary as directed by the Chief Judge.

2. Any new case that is related to an earlier filed case is to be assigned in non-random fashion to the judge who received the earlier case. The civil case information sheet should be of assistance to the Clerk of Court in identifying related cases. Inquiry may be made of the United States Attorney's Office whether a particular criminal case is related to an earlier criminal case. In addition, the personnel in the Clerk's Office are expected to

attempt to identify related cases based on their own understanding of pending litigation. Any questions concerning the possible relation of a new case to an earlier matter should be referred to the Clerk of Court or the Chief Deputy Clerk, who in turn may consult the judge to whom the first case was assigned.

3. Any new case in which a single judge of this court is named as a party is to be assigned in non-random fashion to another judge of this court.

4. All cases filed by the same individual should be assigned to the judge who received the first such case. All criminal cases against an individual defendant should be assigned to the same judge who received the first such case.

5. All cases, whether appeals or otherwise, arising out of the same or related bankruptcy matters should be assigned to the judge who received the first such case. The Clerk of Court may seek assistance from the bankruptcy court in identifying matters arising out of the same or related bankruptcy cases.

6. Whenever a judge recuses himself or herself from a case, it will be necessary to reassign the case in non-random fashion. In some circumstances the Clerk of Court will know at the time of case filing that recusal will be necessary if a particular judge should receive that case, as for example, when the case involves a company whose stock is owned by a particular judge. In such circumstances the Clerk of Court shall make a non-random assignment to the other district judge.

7. Whenever the Clerk of Court assigns a case to a judge other than as the result of the random selection process, a notation should be placed on the docket sheet that the assignment was made in non-random fashion.

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8. In any situation in which a deputy clerk is uncertain of the applicability of this order to the assignment of a particular case, the deputy clerk should seek the advice of the Clerk of Court or Chief Deputy Clerk. If the Clerk of Court or Chief Deputy Clerk thinks that the application of this order is ambiguous as applied to the assignment of a particular case, he should consult the Chief Judge concerning the case assignment.

9. Any party who questions the assignment of a particular case to a particular judge should first inquire of the Clerk of Court or Chief Deputy Clerk concerning the method that was used in assigning that case to a judge. Thereafter a motion may be filed with the judge to whom the case is assigned challenging the case assignment as having been made in a manner inconsistent with this order.

Dated this 25th day of July, 1995.

s/ Barbara B. Crabb
Barbara B. Crabb
Chief Judge

s/ John C. Shabaz
John C. Shabaz
District Judge

7/26/95

## APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED JULY 15, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

97-C-326-C

LEO FRIES,

Plaintiff,

v.

RICHARD J. HELSPER; HELSPER & RASMUSSEN, P.C., a South Dakota Corporation; PAUL DAVID; GEORGE RICHARDS; C. DUANE PATTERSON; PATTERSON, RICHARDS, HESSERT, WENDORFF & ELUSON, a Wisconsin law firm; and O. DALE LARSON,

Defendants.

OPINION AND ORDER

On May 9, 1997, plaintiff Leo Fries filed a complaint in this civil action, alleging that defendants had conspired with a state court judge to deprive him of his Fourteenth Amendment right to due process of law. Shortly thereafter, defendants filed a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12 (b) (6) and notified the court that they intended to seek sanctions against plaintiff pursuant to Fed. R. Civ. P. 11. In the meantime, plaintiff has a motion asking me to recuse myself from this case because both defendant O. Dale Larson and I allegedly have ties to the Democratic Party. The case is presently before the court

on plaintiff's recusal motion and defendants' motion to dismiss. Plaintiff's motion asking me to recuse myself is frivolous and will be denied. Defendants' motion to dismiss will be granted.

A. *Motion to Recuse*

On July 7, 1997, plaintiff filed a "Motion for Removal/Recusal of Judge Barbara B. Crabb" pursuant to 28 U.S.C. § 455. In his motion, plaintiff argues that I should recuse myself for the following reasons: 1) this case was assigned to Chief Judge John Shabaz and I have no authority to hear the matter, 2) in another case involving plaintiff and defendant Richard J. Helsper I made an improper and arbitrary ruling; and 3) I have served in various capacities as an official or campaign promoter of the Democratic Party and am aware of the "avid" support and contributions made to the Democratic Party by defendant O. Dale Larson.

Section 455 (a) states that I must disqualify myself as a judge "in any proceeding in which my impartiality might reasonably be questioned," and §455(b)(1) requires me to disqualify myself in a case in which I have a "personal bias or prejudice concerning a party." Section 144 of Title 28 of the United States Code, which governs motions for recusal and for disqualification of judges as well, provides that when a party proffers a legally sufficient affidavit, averring that the judge has a personal bias or prejudice, the judge cannot proceed further and must assign the proceeding to a different judge.

Because the grounds for disqualification in § 455 and § 144 are similar, they may be considered together. *United States v. Faul*, 748 F.2d 1204, 1210 (8th Cir. 1984). In determining whether an affidavit is legally sufficient under § 144,

> the judge must assume that the factual averments it contains are true, even if he knows them to be false. An affidavit is sufficient if it avers facts that, if true, would convince a reasonable person that bias exists. The factual averments must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. They must not, however, be mere conclusions, opinions, or rumors. . . . The factual averments must show that the bias is personal rather than judicial, and that it stems from an extrajudicial source — some source other than what the judge has learned through participation in the case.

*United States v. Balistrieri*, 779 F.2d 1191, 1199 (7th Cir. 1985)(citations omitted). The bias and prejudice must be personal, not based on a particular judicial proceeding; a judge's unfavorable impressions of a party or belief that a party is dishonest is not a ground for recusal. *United States v. Slaughter* 900 F.2d 1119, 1126 n.5 (7th Cir. 1990). The test for impartiality is whether "an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Persico Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985)(cited in *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 715 (7th Cir. 1986)); *see also Hook v. McDade*, 89 F.3d 350, 354 (7th Cir. 1996) (inquiry is based on objective standard), *cert. denied*, 117 S. Ct. 718 (1997).

Plaintiff's first contention is that this case was assigned to Judge Shabaz and that I have no authority to hear the matter. The Western District of Wisconsin utilizes a system in which cases are assigned by lottery to one of the two district court judges. However, when a judge has entertained a case involving a party

in the past, efforts are made to see that all future cases involving that party are assigned to the same judge. Plaintiff has had two cases in front of me in the past. *See* 95-C-266-C (summary judgment granted to defendant on November 21, 1995); 95-C-740-C (motion to dismiss granted on February 1, 1996). Although plaintiffs latest case was assigned initially by mistake to Judge Shabaz, that error was corrected and the case properly reassigned to me. There is no merit to plaintiff's contention that I lack the authority to hear this case.

Plaintiff argues next that I made an improper and arbitrary ruling in his case no. 95-C-266-C with respect to the removal of Richard J. Helsper as defendants' attorney. Absent a showing that a previous ruling evidences a personal bias toward plaintiff, previous rulings have no relevance to recusal motions. Plaintiff does not make an allegation of personal bias and seems to have forgotten that my ruling in that case was affirmed by the Court of Appeals for the Seventh Circuit.

Plaintiff's final argument is a severe attack on my ability to decide cases in an unbiased and impartial manner. Plaintiff contends that I have a personal bias toward defendant O. Dale Larson because both he and I have ties to the Democratic Party. Plaintiff makes this assertion of improper and unethical conduct with no factual support whatsoever. It is true that I was appointed to this office by a Democratic president, but that is hardly a sufficient indication that I have served as an "official or campaign promoter of the Democratic Party." Before making such a serious charge, plaintiff should have a solid factual basis. He has none. Plaintiffs allegations are balderdash; no reasonable person could believe them. As such, the allegations do not raise a reasonable question of my impartiality under § 455 and are not legally sufficient under § 144. *See United States v. Paul*, 748 F.2d at 1211.

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### B. *Motion to Dismiss*

For purposes of resolving defendants' motion to dismiss, I find the following allegations of fact from plaintiff's complaint.

1. *Allegations of Fact*

Plaintiff Leo Fries is a resident of Rhinelander, Wisconsin. Defendant Richard J. Helsper is a citizen of South Dakota and a member of defendant law firm Helsper & Rasmussen P.C., headquartered in South Dakota. Defendant Paul David is a citizen of Wisconsin and a member of defendant law firm Patterson, Richards, Hessen, Wendorff & Ellison, headquartered in Wisconsin. At all times material to this case, the aforementioned defendants served as counsel to defendant O. Dale Larson, a resident of South Dakota.

On December 27, 1996, plaintiff filed a complaint against Larson, Larson Manufacturing Company, Inc. and Larson Manufacturing Company of Iowa, Inc. in Marathon County Circuit Court, case no. 96-CV-682, alleging that defendants and their attorney, Richard J. Helsper, perpetrated fraud on plaintiff by obtaining a September 1994 order that vacated a February 1994 default judgment against Larson Manufacturing Company. Defendants in case no. 96-CV-682 filed an answer to plaintiffs complaint, but on January 29, 1997, plaintiff filed a motion to strike defendants' answer because of false allegations contained therein. Judge Robert E. Kinney of the Marathon County Circuit Court refused to act on plaintiff's motion. On February 5, 1997, plaintiff filed a motion opposing the appearance of attorney Helsper and his law firm. Again, Judge Kinney did not act on the motion. On March 17, 1997, plaintiff moved to have attorneys Helsper and Paul David held in contempt for allowing Helsper, a

South Dakota attorney, to practice law in Wisconsin. Judge Kinney did not respond.

On March 24, 1997, Larson Manufacturing Company of Iowa, Inc., Larson Manufacturing Company, Inc. and O. Dale Larson moved for summary judgment. On April 28,1997, plaintiff filed a motion for judgment against Larson Manufacturing Company of South Dakota, Inc. On April 29, 1997, Judge Kinney granted summary judgment to the three Larson defendants that had moved for entry of summary judgment. At the summary judgment hearing in response to plaintiffs counsel's statement that plaintiff's motions had been continually ignored by the court, Judge Kinney responded, "[plaintiff's] motions don't make any difference to the decision of this case." On May 1, 1997, Larson Manufacturing Company of South Dakota, Inc. filed a motion for summary judgment.

Defendants and Judge Kinney, along with the clerk of court Donna Seidel, conspired to deprive plaintiff of his royalty claim by concealing or destroying court documents relating to the appointment of defendant Helsper pro haec vice. Defendants and Judge Kinney conspired to proceed with unlawful hearings, knowing that Patterson, Richards, Hessert, Wendorff & Ellison had a conflict of interest. Judge Kinney advised and conferred with defendant attorneys without plaintiff or his counsel on the merits of Larson Manufacturing Company of South Dakota, Inc.'s motion for summary judgment and on an ex parte order allowing defendant Helper to appear pro haec vice.

2. *Discussion*

To state a valid cause of action under § 1983, a plaintiff must allege first that the defendant deprived him of a right secured

by the Constitution or the laws of the United States and second that the defendant acted "under color of state law" in causing that deprivation. *Starnes v. Capital Cities Media, Inc.*, 39 F.3d 1394, 1396 (7th Cir. 1994). In this case, plaintiff alleges 1) that defendants deprived him of his right to due process of law under the Fourteenth Amendment and 2) that defendants were acting under color of state law in doing so because of the conspiracy in which they engaged with Judge Robert Kinney. I take up the "under color of state law" requirement first.

Generally, a private attorney does not act under color of state law merely by representing a client in a court of law. *French v. Corri*, 432 F.2d 1211, 1214-15 (7th Cir. 1970). Similarly, a private defendant like O. Dale Larson does not act under color of state law by appearing in court to defend himself against plaintiff's allegations. Nonetheless, plaintiff contends that the usual rule does not apply in this case because defendants' actions became actions "under color of state law" when they conspired with Judge Kinney, a state actor.

It is true that in some circumstances private actors who collaborate with a state official to deny an individual his constitutional rights may be said to be acting under color of state law. *See Starnes*, 39 F.3d at 1397 (7th Cir. 1994); *see also Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). In order to make such a claim, a plaintiff must allege that the "public and private actors share a common and unconstitutional goal." *Starnes*, 39 F.3d at 1397 (citing *Cunningham v. Southlake Center for Mental Health*, 924 F.2d 106, 107 (7th Cir. 1991)). A plaintiff must demonstrate that "the state officials and the private party somehow reached an understanding to deny the plaintiffs their constitutional rights." *House v. Belford*, 956 F.2d 711, 721 (7th Cir. 1992) (citing *Moore v. Marketplace Restaurant, Inc.*, 754

F.2d 1336, 1352 (7th Cir. 1985)). Mere allegations of a conspiracy are insufficient to withstand a motion to dismiss. *Id.*

It is difficult to discern exactly what plaintiff is alleging in his complaint; it is not a model of clarity. Plaintiff is upset with Judge Kinney for failing to rule on a number of motions he filed. But plaintiff has not named Judge Kinney as a defendant. Even if he had, Judge Kinney would be protected by judicial immunity. Plaintiff does not explain how defendants had anything to do with Judge Kinney's failure to rule on plaintiff's motions and thus cannot tie defendants to Judge Kinney's failure to act. Plaintiff's recourse for his displeasure with Judge Kinney's decisions is to file an appeal with the state appellate court; there is no remedy available in this court.

Plaintiff makes several more allegations against Judge Kinney that involve defendants more closely. Specifically, he alleges that defendants and Judge Kinney conspired to deprive plaintiff of a royalty claim: by concealing or destroying court documents relating to the appointment of defendant Helsper pro haec vice; by proceeding with unlawful hearings, knowing that Patterson, Richards, Hessert, Wendorff & Ellison had a conflict of interest; and by advising and conferring with one another without plaintiff or his counsel on the merits of Larson Manufacturing Company of South Dakota, Inc.'s motion for summary judgment and on an ex parte order allowing defendant Helper to appear pro haec vice.

A conspiracy between a judge and an attorney to purposefully violate a party's constitutional rights is a serious charge to make. Both judges and attorneys risk their livelihood and their freedom by engaging in a conspiracy. Nonetheless, such conspiracies may occur on occasion. The law provides a remedy for those times.

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Because of the seriousness of a conspiracy claim, the Court of Appeals for the Seventh Circuit has made it clear that a plaintiff needs to make more than bald accusations in his complaint in order to survive a motion to dismiss. *See Anderson v. County of Montgomery*, 111 F.3d 494, 501 (7th Cir. 1997) ("Judges often see unrepresented prisoners [making conspiracy claims.] It is a rare event, though, to see a licensed attorney proffering claims of this sort, which impugn the honesty of court officers."). Plaintiff's conclusory accusations are not enough to allow him to go forward in this instance. His allegations lack the concrete facts necessary to proceed.

Even if plaintiff's allegations of a conspiracy were sufficient, I would have to dismiss this case on other grounds. Plaintiff's case in front of Judge Kinney still appears to be proceeding, at least with respect to defendant Larson Manufacturing Company of South Dakota, Inc. Plaintiff can raise the matter of defendants' and Judge Kinneys alleged misdeeds in an appeal to a Wisconsin state appellate court. Because plaintiff has access to those avenues of relief, he has not been deprived of due process. *See Guenther v. Holmgreen*, 738 F.2d 879, 882 (7th Cir. 1984) ("a victim of a property or liberty deprivation who has recourse to an adequate state remedy has not been denied 'due process of law' "); *see also Hood v. City of Chicago*, 927 F.2d 312, 314 (7th Cir. 1991) (plaintiff not deprived of liberty without due process of law where state provides adequate tort law remedies).

ORDER

IT IS ORDERED that the motion to dismiss of defendants Richard J. Helsper, Helsper & Rasmussen, Paul David, George Richards, C. Duane Patterson, Patterson, Richards, Hessert, Wendorff & Ellison and O. Dale Larson is GRANTED. IT IS

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FURTHER ORDERED that the motion of plaintiff Leo Fries for my recusal or removal is DENIED. This court will retain jurisdiction of the case until it has time to consider defendants' motion for Rule 11 sanctions, which will be taken up at the hearing on July 16, 1997.

Entered this 15th day of July, 1997.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

## APPENDIX E — COMPLAINT BY PLAINTIFF LEO FRIES TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN FILED MAY 9, 1997

**UNITED STATES DISTRICT COURT**
**FOR THE**
**WESTERN THE DISTRICT OF WISCONSIN**

[stamped]
'97 C 0326 S

Leo Fries,

Plaintiff,

vs.

Richard J. Helsper, Helsper & Rasmussen P.C., a South Dakota Corporation, Paul David, George Richards, C. Duane Patterson, Patterson Richards Hessert Wendorff & Ellison, a Wisconsin law firm, and O. Dale Larson.

Defendants.

**COMPLAINT**

**AS A COMPLAINT LEO FRIES by his attorney Larry W. Rader, alleges:**

***Jurisdiction***

**The district court has original jurisdiction under the Civil Rights Act herein to hear the following alleged cause(s) of action. 42 U.S.C. A. § 1983 (1994)**

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*General Nature of the Fries Civil Rights Claim*

**Defendants acting under color of state law conspired as alleged herein to deprive Fries of his property without due process of law contrary to the Civil Rights Act, section 1983, in vacating the Marathon County Circuit Court 1994 default judgment in case 93 CV 784 which awarded him a 1% royalty (now calculated at 2.8 million) against "Larson Manufacturing Company" and in Larson obtaining dismissal of his subsequent civil actions for relief. (*see Kimes v Stone*, 84 F. 3d 1121 (9th Cir. 1996)**

*The Parties*

**1. The plaintiff, LEO FRIES resides in Lincoln County at N11570 Hilts Lake Rd, Rte 2, Rhinelander, WI 54501. Fries was a former naval pilot and is a veteran.**

*The Defendants*

**2. Richard J. Helsper is a South Dakota attorney and a member of the South Dakota law firm known as Helsper & Rasmussen P.C. with offices at 425 22nd Avenue South, P.O. Box 198, Brooking, South Dakota, 57006. At times material hereto said defendant Helsper and his law firm represented as counsel and general counsel "Larson Manufacturing Company" incorporated in 1964 in SD but which changed its name in 1993 (unknown to Fries until 1997) to Larson Manufacturing Company of South Dakota, Inc., Larson Manufacturing Company of Iowa, Inc. incorporated in in SD in 1982 and also known as, "Larson Manufacturing Company," and Larson Manufacturing Company, Inc. incorporated in 1993 in South Dakota, and which is also**

**known as "Larson Manufacturing Company," and, O. Dale Larson.**

**3. Paul David is a Wisconsin attorney residing at Wausau and is a member of the law firm known as Patterson Richards, Hessert, Wendorff, & Ellison with offices at 630 Fourth Street, Wausau, WI 54401. Defendants C. Duane Patterson and George Richards, are residents of Marathon County and are, upon information and belief, senior attorney members of said Patterson law firm. At times material hereto said attorneys or their firm represented the Larson defendants in paragraph 2 above.**

**4. O. Dale Larson resides at Brookings, South Dakota and at times material hereto was the president, director and controlling shareholder of each of the LARSON companies identified in paragraph 2 above. The said "Larson Manufacturing Company" South Dakota corporations are not parent-subsidiary related but each has separate assets, liabilities and financial records.**

**Cause of Action under 42 U. S. C. § 1983.**

**5. Dale Larson caused Larson Manufacturing Company, Inc. (LMCI) to be incorporated on June 30, 1993 in South Dakota, and then unlawfully obtained a certificate of authority to do business in Wisconsin which corruptly induced service on the wrong corporation, namely LMCI. LMCI pled the defense of the statute of frauds and LMCI obtained the 1995 dismissal of case 95 C 0266 in the above district court. Defendant O. Dale Larson and his corporations knew that the Fries 1984 royalty contract was with Larson Manufacturing Company, *a 1964 incorporated***

***SD company*, which changed its name on June 30, 1994 to Larson Manufacturing Company of South Dakota, Inc., which facts were not disclosed to Fries until 1997.**

**6. Dale Larson knew LMCI had no privity of contract with Fries.**

**7. That said conduct constitutes a fraud on Fries and the court under color of state law (false and deceptive Wis. and SD corporate names, and status; misuse of the Wis. Statutes of Frauds defense & Wis. Certificate of Authority and registered agent status including that of Larson Manufacturing Company of Iowa, Inc. a South Dakota company) by O. Dale Larson, controller. LMC-IA also had no privity with the Fries 1984 royalty contract, and was not licensed or operating in Iowa when the LARSON Lake Mills, Iowa plant (operated by LMQ) adapted the Fries design to the Magna-Core door in 1984.**

8. On **December 27, 1996** the plaintiff filed a complaint (Marathon County Case No.96 CV 682) against the above identified LARSON defendants alleging the ***fraud perpetrated on him and the court by the said Larson defendants and their Attorney Richard J. Helsper*** in obtaining an **Order** dated September 1994 vacating the February 24, 1994 default judgment against "Larson Manufacturing Company," which **Ordered** said "Larson Manufacturing Company" to pay FRIES a 1% royalty fee for using his magnetic seal design on LARSON's Magna-Core storm door series. The royalty presently due Fries thereunder is calculated at over 2.8 million dollars as shown in the record.

9. The answer of said Larson defendants in case **682** signed by Helsper alleges that FRIES failed to served the *correct* "Larson

Manufacturing Company" corporation in 1994, namely, Larson Manufacturing Company of South Dakota, Inc..

10. On February 24, 1997 **Fries** filed an amended complaint joining **Larson Manufacturing Company of South Dakota, Inc.** The answer filed March 6, 1997 by **ALL** of the Larson defendants to the amended complaint signed by Helsper is attached.

11. On January 29, 1997 Fries filed a motion to strike the answer of the Larson defendants because of false allegations as to the Larson corporate identities, organization and Helsper's appearance. **Judge Kinney refused to act on said motion.**

12. On February 5, 1997 FRIES filed a motion opposing the appearance of out of state attorney Richard J. Helsper and Helsper & Rasmussen P.C. to practice law in Wisconsin and to sign pleading herein a violation of, and a crime under, Wis. Stats. 757.30. Again, Judge Kinney refused to act on said motion.(see 2/28/97 letter to atty David attached)

13. On March 17, 1997 **Fries** moved to have attorneys Helsper and Paul David held in contempt (see 750.30 Stats.) for allowing Helsper to practice law in Wisconsin contrary to law. **Judge Kinney again refused to act on said motion.**

14. On March 24, 1997 (signed 4/2/97) Judge Kinney entered a scheduling order staying discovery and ordering all of said defendants to file their motions for dismissal or summary judgment and briefs before March 29, 1997 or well before the hearing set on summary judgment, to wit: April 29, 1997 at 2:00 p.m.

15. On March 24, 1997 three of the LARSON defendants, namely, **Larson Manufacturing Company of Iowa, Inc, Larson**

**Manufacturing Company, Inc., and O. Dale Larson,** moved for summary judgment.

16. On April 28, 1997 Fries filed a **Motion for Judgment** against **Larson Manufacturing Company of South Dakota. Inc.** which company had not filed for summary judgment, and which company the Larson answer alleged was the true corporate defendant in the 1994 default judgment. LMC-SD did not object to jurisdiction over it in 1994 under the default judgment or disclose it was the *true defendant* in 1994.

17. In support of his motion Fries attached his affidavit showing he had obtained a "second legal opinion" from attorney George Richard of the Patterson law firm in 1995 concerning his royalty claim and pending law suit against Larson.

18. On April 29, 1997 Judge Kinney proceeded to grant summary judgment of dismissal to the three Larson defendants, namely O. Dale Larson, LMC-IA and LMCI. Attorney Helsper argued at the hearing that . . . "and Paul David's done and excellent job" for Larson. Judge Kinney again *ignored* the Patterson firm attorney conflict of interest with Fries and their representation of the defendants.

19. At page 36 of the transcript of said hearing after Fries' counsel stated that:

> **". . . Mr. Fries' motions have been continually ignored by this Court."**

The Court (Judge Kinney) responded: **"Mr. Fries' motions don't make any difference to the decision of this case."**

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20. On **May 1, 1997 Larson Manufacturing Company of South Dakota, Inc.** filed a motion for summary judgment by attorney Paul David and the Patterson Law firm.

21. The named defendants and Judge Robert E. Kinney along with the Clerk of Circuit Court, Donna Seidel, conspired to deprive him of his royalty claim by, upon information and belief, *concealing or destroying court documents* relating to the appointment of attorney Richard J. Helsper pro haec vice. Defendants knew that prior appointed Marathon County Judge(s) had REFUSED to sign an order for Helsper's admission pro haec vice. (see attached letter of 3/4/97 to Judge Kinney.)

22. The said defendants and said judge did conspire to proceed with an unlawful hearings knowing of the attorney client conflict of the Patterson law firm all in violation of Fries' due process rights, and, further knowing that Larson and Helsper and David/ Patterson Law Firm defendants' had filed false answers with respect to the documents on file in the office of the Wisconsin Secretary of State as set forth in the Fries motion to strike.

23. Judge Robert E. Kinney did also ADVISE AND CONFER with said Larson attorneys named herein without the privy of Fries or his counsel on the merits of LMC-SD proceeding with filing a motion for summary judgment,. and the signing of an ex parte order on Helper's appearance in his court after the hearing which were not part of the record, and **contrary to the scheduling order.** That said judge acted with said attorneys for Larson in violation of Fries' rights of preclusion and judicial impartiality.

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**WHEREFORE, FRIES DEMANDS ROYALTY DAMAGES OF 2.8 MILLION DOLLARS AS OF 12/31/96, INTEREST, AND DAMAGES AS AWARDED IN THE 1994 DEFAULT JUDGMENT ON FUTURE LARSON NATIONAL SALES, AGAINST SAID DEFENDANTS JOINTLY AND SEVERALLY, AND FOR EXEMPLARY OR PUNITIVE DAMAGES, AND FOR SUCH COSTS AND FEES AS ALLOWED BY LAW, OR FOR OTHER JUST RELIEF.**

APPROVED FOR FILING
s/ Leo Fries
**s/ LEO FRIES**

**s/ Larry W. Rader, Esq.**
**LARRY W. RADER, Esq.**
Counsel for Leo Fries
PO Box 684
Wausau, WI 54402
715 842 3305
BAR NO. 1008385

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**ORDER**

Any dispositive motion filed by any of the parties prior to the preliminary pretrial conference to be scheduled in this matter shall be accompanied by appropriate memorandum of law; opposing party has 20 days to respond; and the moving party 10 days to reply.

This will be the only briefing schedule issued prior to the preliminary pretrial conference, and only those motions filed with appropriate memoranda will be recognized.

BY THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

## APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN FILED FEBRUARY 2, 1996

**UNITED STATES DISTRICT COURT FOR THE**
**Western District of Wisconsin**

Case No.: 95-C-0740-C

LEO FRIES,

**Plaintiff,**

**vs.,**

WILLIAM R. HAY, O. DALE LARSON, BEN REMER and RICHARD J. HELSPER,

**Defendant(s).**

### JUDGMENT IN A CIVIL CASE

**This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.**

### IT IS ORDERED AND ADJUDGED

that the defendants' motion to dismiss is GRANTED, and the defendants' motion for sanctions is DENIED. Judgment is entered in favor of defendants William R. Hay, O. Dale Larson, Ben Remer and Richard J. Helsper, and this case is closed.

*Appendix F*

Copy of this document has been
provided to: Plaintiff
and Atty Strasser
this 2nd day of Feb., 1996
By L. Lowe
Deputy Clerk

s/ Joseph W. Skupniewitz, Clerk
Joseph W. Skupniewitz

by Deputy Clerk

FEB 2 1996
Date

## *APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN FILED NOVEMBER 24, 1995*

**UNITED STATES DISTRICT COURT FOR THE**
**Western District of Wisconsin**

Case No.: 95-C-0266-C

LEO FRIES,

**Plaintiff(s),**

**vs.,**

LARSON MANUFACTURING COMPANY

**Defendant(s).**

**JUDGMENT IN A CIVIL CASE**

**This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.**

**IT IS ORDERED AND ADJUDGED**

that the motion for summary judgment of defendant Larson Manufacturing Company is GRANTED. Judgment is entered for defendant and this case is CLOSED.

*Appendix G*

Copy of this document has been
provided to: Attys Schmidt, Strasser
this 24th day of Nov. 1995
By s/ V. Barlup
Deputy Clerk

s/ Joseph W. Skupniewitz, Clerk
Joseph W. Skupiewitz, Clerk

by Deputy Clerk

Nov 24 1995
Date

## APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JULY 1, 1998

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604

July 1, 1998

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

Nos. 97-2796, 97-2846, 97-2908, 97-3142

LEO FRIES,

Plaintiff-Appellant,

v.

RICHARD J. HELSPER, et. al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 97 C 326

**Barbara B. Crabb,** *Judge.*

*Appendix H*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiff-appellant, all of the judges on the original panel have voted to deny and no judge in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

# APPENDIX I — RELEVANT STATUTES AND RULES

## 42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or *causes* to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit* in equity, or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of the section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Pub.L. 104-817, Title III § 398(c). Oct. 19, 1996, 110 Stat. 3858.)

## 28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances.

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding:

**RULE 7, U.S.D.C., E.D. OF WIS., Sections 707(A)(2)(i) & (ii):**

**Section 7.07 Mandatory Discovery.**

(a) *Mandatory Interrogatories for All Parties.* The parties, unless excused by this rule, are required to answer pursuant to FRCR 33 the following mandatory interrogatories. If there is more than one plaintiff or more than one defendant in the action, each plaintiff and each defendant must answer each interrogatory separately unless the answer to the interrogatory is the same for all plaintiffs or all defendants. The answers shall indentify the individual attorneys representing a party by full name, address, and telephone number.

* * *

(2) Interrogatories to Be Answered by All Defendants. Each defendant's answers to mandatory interrogatories shall be served no later than 30 days after the date of service of plaintiff's mandatory interrogatories.

The mandatory interrogatories to be answered by all defendants are as follows:

*Appendix I*

(i) If the defendant is improperly identified, state defendant's correct identification and state whether defendant will accept service of an amended summons and complaint reflecting the information furnished in the answer to this interrogatory.

(ii) Provide the names of any parties whom defendant contends are necessary parties to this action, but who have not been named by plaintiff. If defendant contends that there is a question of misjoinder of parties, provide the reasons for defendant's contention.

**Rule II. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions.**

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record on the attorney's individual name. or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing,

submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances. —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated,

the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

## APPENDIX J — NOTICE OF HEARING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED JULY 1, 1997

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. HENRY ST., #320
POST OFFICE BOX 432
MADISON, WISCONSIN 53701
(608) 264-5156

N-O-T-I-C-E

DATE: July 1, 1997

TO: LARRY W. RADER
PAUL E. DAVID

COURT PROCEEDING: MOTION HEARING
RE: MOTION BY DEFTS. FOR SANCTIONS.

| | |
|---|---|
| CASE NUMBER: | 97-0-0326-C |
| CASE NAME: | FRIES, LEO v.<br>HELSPER, RICHARD J. |
| JUDICIAL OFFICER: | U.S. District Judge<br>BARBARA B. CRABB |
| DATE/TIME: | July 16, 1997, 1:00 P.M. |
| LOCATION: | Room 250<br>Federal Courthouse<br>120 N. Henry St.<br>MADISON, WISCONSIN |

*Appendix J*

JOSEPH W. SKUPNIEWITZ, CLERK

cc: Judge CRABB